# MEMORANDUM

TO: Members of the House Permanent Select Committee on Intelligence
FR: Jeffrey H. Smith[1]
RE: Legal authorities regarding warrantless surveillance of U.S. persons
DA: January 3, 2006

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## I. Overview

This memorandum addresses the legal issues presented by the NSA program involving warrantless electronic surveillance of United States persons within the United States as reported in the media and described by President Bush on December 17, 2005. This is a preliminary analysis, provided without the benefit of any facts regarding the program other than those that have been reported in the media. A court reviewing the legality of the NSA program would be greatly influenced by the specific facts, which are largely unknown to the public at this time. Further, courts will likely give significant deference to the President with respect to actions taken to protect our national security. It is also important to recognize the essential need to collect vital intelligence to protect our nation.

The Administration, in a briefing for the press on December 19, 2005 by Attorney General Gonzales and in a subsequent letter to the Intelligence Committees, has provided two legal justifications for the NSA program.

***First,*** they argue that authorization is inherent in the 2001 Congressional Authorization for the Use of Military Force in response to the 9/11 attacks. They acknowledge that the NSA program is within the scope of the Foreign Intelligence Surveillance Act (FISA), which requires a court order for electronic surveillance of U.S.

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persons "unless otherwise authorized by statute." They argue the Authorization for the Use of Military Force is such a statute.

***Second,*** they argue that, as Gonzales also said, "the President has the inherent authority under the Constitution, as Commander-in-Chief, to engage in this kind of activity."

## II. Analysis

### *A. Summary*

On the statutory argument, it is not credible that the 2001 authorization to use force provides authority for the President to ignore the requirements of FISA. It is very doubtful that the courts would sustain the President on this basis.

On the constitutional point, the President can make a case, although it is weak, that he does have constitutional authority to conduct warrantless wiretaps of American citizens in the U.S. for national security purposes. Because the Supreme Court has never said he does not have this power, some regard it as an open question. However, passage of FISA seriously undermines this argument.[2]

### *B. Background*

In 1972, the U.S. Supreme Court decided United States v. United States District Court[3] (the "Keith" case), in which a unanimous Court held that in cases of domestic security investigations, compliance with the warrant provisions of the Fourth Amendment was required.

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[2] The Congressional Research Service, in a memorandum dated January 5, 2006, reached a similar conclusion regarding the legality of the NSA program, stating "the Administration's legal justification [for the NSA program] . . . does not seem to be as well-grounded as the tenor of [its analysis] suggests." Presidential Authority to Conduct Warrantless Electronic Surveillance to Gather Foreign Intelligence Information, Congressional Research Service, January 5, 2006 (available at: http://www.fas.org/sgp/crs/intel/m010506.pdf).

[3] United States v. United States District Court, 407 U.S. 297 (1972).

Justice Powell, writing for the Court, held that the President's responsibilities to protect national security did not trump the 4th Amendment's requirement that the government present to a neutral magistrate evidence sufficient to support issuance of a warrant before the government could invade the privacy of its citizens.

The target of the government's surveillance in Keith was a U.S. citizen with no alleged ties to a foreign power. The Court specifically left open the question of whether a warrant was required "with respect to activities of foreign powers or their agents."[4]

The uncertainly that followed Keith, coupled with grave concerns about abuses in the past, led Congress in 1978 to enact FISA.

FISA established the Foreign Intelligence Surveillance Court and the procedures by which the government may obtain a court order authorizing electronic surveillance (commonly referred to as a FISA warrant) for foreign intelligence collection in the U.S. In general, if there is a substantial likelihood that the surveillance will acquire communications of a U.S. person inside the United States, then electronic surveillance may not be conducted without a court order.[5]

FISA provides specific exceptions allowing the President to authorize warrantless surveillance in emergencies,[6] and for fifteen days following a declaration of war by Congress,[7] but otherwise, FISA applies within the Unites States and states: "Notwithstanding any other law, the President … may authorize electronic surveillance without a court order … [if] there is *no substantial likelihood* that the surveillance will

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[4] Id. at 322 n.20.
[5] See 50 U.S.C. §§ 1801(f), 1802(a)(1)(B).
[6] Under FISA, the Executive branch may act *unilaterally* in an emergency. FISA gives the Attorney General the authority to approve an emergency surveillance order. The Attorney General must determine that an emergency situation exists and that the factual basis for issuance of an order to approve the surveillance exists. If those requirements are met, the Attorney General must simply notify (not seek a warrant from) a judge. The Executive branch must then request a warrant as soon as practicable, but not more than 72 hours after the authorization of the surveillance. 50 U.S.C. § 1805(f).
[7] 50 U.S.C. § 1811.

acquire the . . . communications to which a United States person is a party." 18 U.S.C. § 1802 *(emphasis added)*.

Section 2511(2)(f) of title 18 provides that the procedures of two chapters of title 18 and FISA "shall be *the exclusive means* by which electronic surveillance ... and the interception of domestic wire, oral, and electronic communications may be conducted."[8] The law imposes criminal penalties on anyone who "intentionally intercepts . . . any wire, oral, or electronic communication" except as authorized by those chapters of title 18 or FISA. See 18 U.S.C. § 2511. Section 109 of FISA makes it unlawful to conduct electronic surveillance, "except as authorized by statute." 50 U.S.C. § 1809(a)(1).

*C. Statutory Authority*

FISA requires court orders in all cases "unless otherwise authorized by statute."[9] The Administration's position is that the Authorization for the Use of Military Force ("AUMF") constitutes the "other statute" authorizing warrantless wiretapping of U.S. persons. The AUMF authorized the President to use "all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks of September 11, 2001."

In support of this argument, the Administration points to the Supreme Court's plurality opinion in Hamdi v. Rumsfeld.[10] In Hamdi, a U.S. citizen who was a member of Al Qaida challenged his detention on the grounds that 18 U.S.C. § 4001(a) prohibited detaining a U.S. citizen unless authorized by an Act of Congress. Justice O'Connor wrote in the controlling plurality opinion that the AUMF, which authorized the

[8] "[P]rocedures in this chapter and the Foreign Intelligence Surveillance Act of 1978 shall be the exclusive means by which electronic surveillance, as defined in section 101 of such Act, and the interception of domestic wire and oral communications may be conducted." 18 U.S.C. § 2511.
[9] 50 U.S.C. § 1809(a)(1).
[10] Hamdi v. Rumsfeld, 542 U.S. 507 (2004).

President to deploy all "necessary and appropriate" force against Al Qaida, provided the statutory authority for detaining Mr. Hamdi. The Court reasoned that the detention of individuals "who fought against the United States in Afghanistan as part of the Taliban, . . . for the duration of the particular conflict in which they were captured, is so fundamental and accepted an incident to war as to be an exercise of the 'necessary and appropriate force' Congress has authorized the President to use."[11] Because detention is a fundamental aspect of military force, the Court concluded, the detention of Al Qaida members (even U.S. citizens) was authorized by Congress through passage of the AUMF.

The Administration's reliance on Hamdi raises several concerns.

The Administration argues that Hamdi supports the position that the AUMF provides the Executive branch with plenary power in targeting Al Qaida. Gonzales's argument strongly suggests that the President is not bound by any statute, as long as he deems his action to be "necessary and appropriate" in attacking Al Qaida. They also argue that the ability to collect intelligence, including from American citizens, is a "fundamental incident of war" and thus is inherent in Congress' grant of authority to the President.

However, in Hamdi, the Supreme Court did not agree with this expansive view of Presidential powers. Justice O'Connor wrote: **"We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens."**[12]

[11] Id. at 518.
[12] Id. at 536 (citing Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579,587 (1952)).

As discussed below, the courts are disposed to support broad assertions for Presidential authority in areas where Congress has not acted. Certainly, the collection of intelligence is understood to be necessary to the execution of the war. However, even if electronic surveillance of U.S. persons in the United States is a "fundamental incident of war" that could be interpreted to fall under the AUMF, the existence of FISA strongly undercuts the Administration's position that the AUMF authorizes the NSA program.

In Hamdi, Congress had not established a preexisting statutory scheme governing the detention of enemy combatants. As a result, Congressional intent could be gleaned from the AUMF alone. With respect to the NSA surveillance program, Congress has established a complex statutory scheme, through FISA and its amendments, governing electronic surveillance of U.S. persons for the purposes of gathering foreign intelligence information. There is no indication in the AUMF that Congress intended to authorize the President to ignore an existing statute that established a comprehensive scheme for conducting domestic electronic surveillance.

Indeed, it is hard to believe that Congress had any idea that it was authorizing such sweeping Presidential powers affecting the rights of American citizens. As Tom Daschle, the Senate Majority Leader at the time Congress passed the AUMF, has noted, the Administration sought to add language to the resolution that would have explicitly authorized the use of force "in the United States." Congress refused, strongly suggesting that it did not intend the AUMF as a grant of plenary powers to the President.

The Administration's argument is further weakened by the fact that the President sought, and obtained, amendments to FISA as part of the Patriot Act in 2001, at almost the exact time the AUMF was passed, saying that those amendments were necessary to fill gaps in FISA. That new authority was designed to make FISA orders easier to obtain,

but it did not authorize the sort of wide scale domestic surveillance now reportedly underway. The President did not inform the Congress at the time of the 2001 AUMF that he intended to use it as authority to conduct widespread electronic surveillance in the United States without a FISA order. Nor did Congress amend FISA to grant the authority to conduct warrantless surveillance of U.S. persons. If the President wanted this authority he should have forthrightly asked for it at the time he sought amendment of FISA in 2001.

Finally, the legislative history of FISA indicates that Congress and the President who signed FISA into law intended the statute to be the exclusive means by which electronic surveillance for foreign intelligence purposes could be conducted. Prior to passage of FISA, Title III contained an exception to the warrant requirement of 18 U.S.C. § 2511 that excluded surveillance conducted pursuant to the "constitutional power of the President to take such measures as he deems necessary to protect the Nation . . . [and] to obtain foreign intelligence information deemed essential to the security of the United States." 82 Stat. 214, formerly codified at 18 U.S.C. § 2511(3). In passing FISA, Congress repealed this language from Title III and replaced it with the requirement that "procedures in this chapter and the Foreign Intelligence Surveillance Act of 1978 shall be the exclusive means by which electronic surveillance, as defined in section 101 of such Act, and the interception of domestic wire and oral communications may be conducted." 18 U.S.C. § 2511(2)(f). Congress further stated that this exclusivity provision was intended to "put to rest the notion that Congress recognizes an inherent Presidential power to conduct such surveillances in the United States outside of the

procedures contained in chapters 119 and 120 [of title 18, U.S. Code]." S. Rep. No. 95-604(I), at 64 (1978).[13]

In signing FISA, President Carter made clear that the Act was designed to be the exclusive legal authority for electronic surveillance of U.S. persons in the United States. At the bill signing, President Carter stated: "The bill requires, for the first time, a prior judicial warrant for *all* electronic surveillance for foreign intelligence or counterintelligence purposes in the United States in which communications of U.S. persons might be intercepted. It clarifies the Executive's authority to gather foreign intelligence by electronic surveillance in the United States." (emphasis in original)

Accordingly, the Administration's argument that the AUMF provides statutory authority to bypass the requirements of FISA in conducting electronic surveillance of U.S. persons is undermined by (1) the existence of an exclusive legislative framework for conducting electronic surveillance of U.S. persons for foreign intelligence purposes, (2) Congress' failure to amend FISA to grant the authority to conduct warrantless surveillance of U.S. persons, and (3) Congress' refusal to include language in the AUMF that would have authorized the use of force in the United States.

*D. Constitutional Authority*

The Administration's only viable argument to justify the NSA program is the President's executive authority under Article II, including his role as Commander-in-Chief of the armed forces. The President has broad authority under the Constitution with respect to foreign affairs and to actions necessary to protect national security. That power is, of course, shared with Congress. The Administration's argument in reliance

[13] For a more complete analysis of this issue, see Presidential Authority to Conduct Warrantless Electronic Surveillance to Gather Foreign Intelligence Information, Congressional Research Service, January 5, 2006 at 19-23, 27-30(available at: http://www.fas.org/sgp/crs/intel/m010506.pdf).

on the President's power would have been at the apex of its strength in the weeks following 9/11 and in those areas where Congress has not legislated an "exclusive" statutory framework. Four years later it is hard to justify conducting warrantless surveillance of U.S. persons, particularly when FISA was intended to be "exclusive," has provisions authorizing emergency surveillance, and obtaining a FISA warrant is relatively easy.

The President's inherent authority is considered greatest in areas where Congress has not legislated. Under the well-known principle enunciated by the Supreme Court in the *Steel Seizure Case,*[14] where Congress has legislated – as it has with FISA – the President's inherent authority is at its weakest. In what has become the leading analysis of inherent presidential power, Justice Jackson's concurring opinion stated:

> When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive executive Presidential control in such a case only by disabling the Congress from acting upon the subject.[15]

Jackson determined that the steel plant seizure at issue fell within this category and that to sustain the President's action, the court must find that the seizure was "within [the President's] domain and beyond control by Congress."[16] Jackson ultimately concluded that the President's residual authority under the Commander-in-Chief clause did not extend to the seizure of persons or property even when such seizure was "important or even essential for the military and naval establishment."[17] Jackson reasoned that because Congress had the power to "raise and support armies" under the

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[14] Youngstown, 343 U.S.at 609.
[15] Youngstown, 343 U.S. at 637-38 (Jackson, J. concurring).
[16] Id. at 640.
[17] Id.

Constitution, Congress could determine the means by which such materials, including steel, would be supplied.

Since Congress intended FISA to be the exclusive means by which electronic surveillance of U.S. persons within the United States may be conducted, the NSA program also likely falls into this category of Jackson's analysis. With respect to the NSA program, the President's actions are incompatible with FISA's express provisions barring warrantless surveillance of U.S. persons in the United States. According to Jackson's analysis, in order to sustain Executive power to contravene an Act of Congress, a court would be required to rule that Congress could not legislate controls on surveillance of United States persons for national security purposes.

Congress has the authority to "make rules for the Government and regulation of the land and naval forces," to "regulate commerce" and to "make all laws which shall be necessary and proper for carrying into Execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States or in any Department or Officer thereof." U.S. Const. Art. I Sec. 8. It is under this authority that Congress acted when it passed FISA. Accordingly, under Jackson's analysis, the President lacks the residual constitutional authority to conduct warrantless surveillance on U.S. persons in contravention of an existing statute. He might have had such authority in the period of time between the Keith case and the passage of FISA, but there is not a strong case to be made that he has such power today.

In Assistant Attorney General Moschella's December 22, 2005 letter to the Chairs and Ranking Members of the House and Senate Select Committees on Intelligence, the Administration asserts the position that the President has the authority under the Constitution to "order warrantless foreign intelligence surveillance within the United

States." In support of that argument, Mr. Moschella cites only the FISA Court of Review's 2002 decision reversing the lower FISA court's denial of the government's application for a FISA warrant,[18] in which the court stated: "[A]ll the other courts to have decided the issue [have] held that the President did have inherent authority to conduct warrantless searches to obtain foreign intelligence information . . . . We take for granted that the President does have that authority." This statement is pure dicta. The issue of whether the President possesses inherent authority under the constitution to conduct warrantless surveillance was not before the FISA review court. Rather, the issue was whether surveillance, pursuant to a warrant obtained in accordance with the newly added "significant purpose" test of FISA, was reasonable under the Fourth Amendment. The FISA review court, applying the balancing test set forth in the Keith case and determining that the procedures and government showings required under FISA were close to the minimum Fourth Amendment warrant standards, held that such surveillance, conducted in accordance with the warrant requirements of FISA, was reasonable and therefore constitutional.[19]

The Administration also argues that several Circuit court cases have stated that the President possessed inherent authority to conduct warrantless surveillance for the purpose of foreign intelligence gathering. The Administration did not cite those cases so the strength of that argument cannot be fully assessed. However, the Circuit cases we have been able to locate addressed surveillance conducted before FISA was enacted,[20] and therefore, provide no real support to the Administration's position.

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[18] In re Sealed Case, 310 F.3d 717 (FISA Ct. of Review 2002).
[19] Id. at 746.
[20] See Untied States v. Truong Dinh Hung, 629 F.2d 908, 912-14 (4th Cir. 1980); United States v. Buck, 548 F.2d 871, 875 (9th Cir. 1977); United States v. Butenko, 494 F.2d 593, 605 (3rd Cir. 1974); United States v. Brown, 484 F.2d 418, 426 (5th Cir. 1973).

In sum, without express statutory authority, and particularly when acting in contravention of existing statutory law, the President's residual constitutional authority is at its lowest level. Although the President has some support for his view, it is not widely endorsed. Moreover, should the President's view be sustained it would be a dramatic expansion of Presidential authority affecting the rights of our fellow citizens that undermines the checks and balances of our system, which lie at the very heart of the constitution.

## III. Questions

To be fair to the President, the attacks of 9/11 presented great challenges to our government. FISA was adopted over 28 years ago and technology has changed vastly. The President was correct in concluding that many of our laws were not adequate to deal with this new threat. He was wrong, however, to conclude that he is therefore free to follow the laws he agrees with and ignore those with which he disagrees.

This program raises a host of factual, legal and operational questions. These include the following:

1) What is the purpose of the program?

2) What intelligence has been obtained and what is its value?

3) Who are the targets of the collection? Are they known individuals or organizations? Or are they merely telephone numbers, websites and email addresses?

4) The press has reported that initial operations in Afghanistan collected considerable data, including phone numbers and email addresses in the U.S., is this correct? If so, why could the Administration not obtain FISA warrants

or use other techniques, such as "pen registers" to collect the necessary intelligence?

5) Can the Administration gather the same intelligence by using the FISA court? Is bypassing FISA the only option?

6) What controls are in place and why has it been necessary to seek so many Presidential re-authorizations?

7) The press has reported that the operation was shut down in 2004 because of concerns about the legality and breadth of the collection. What were those concerns and how were they resolved? The press has also reported that the then Deputy Attorney General refused to authorize the program, requiring a visit to the hospital bed of Attorney General Ashcroft. What were the Deputy Attorney General's objections and why did the Attorney General authorize it over those objections?

8) Why can't the Administration use the "hot pursuit" exception in FISA, which allows the government to begin the surveillance on a U.S. target and then seek a court order within 72 hours?

9) Are there other intelligence programs the Administration believes are justified by the AUMF resolution that it has not briefed to Congress? For example, are there physical searches being conducted in the United States without a warrant?

10) If the President determines that only the "Gang of Eight" should be briefed about an intelligence activity, should he be required to advise them that, under his constitutional authority, he is acting in contravention of a specific statute?

11) Was any information obtained from the warrantless surveillance of a U.S. person inside the United States used as the basis for a FISA warrant? If so, will the underlying information and the information obtained as a result of the FISA warrant based on such information taint a subsequent criminal proceeding?

## IV. Conclusion

The 2001 AUMF does not, in my view, justify warrantless electronic surveillance of United States persons in the United States. Such surveillance may only be conducted under FISA.

The President does have an argument, although I believe it to be weak under the circumstances as we know them today, that his responsibilities under the Constitution authorize such surveillance. This argument is seriously undermined by the enactment of FISA in 1978 and its prohibitions against warrantless surveillance of U.S. persons in the United States. Where the President acts in contravention of an existing statute, particularly one with criminal penalties attached, his constitutional authority is at its "lowest ebb."

As with all such issues, much depends on the facts. I therefore strongly urge the Committee to be briefed on the facts of the program. It should then be possible to make a judgment as to whether this program complied with the law or whether any changes to the law are necessary to accomplish the nation's intelligence and national security objectives while protecting the constitutionally guaranteed rights of our fellow citizens.